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No. 89-1656

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN GOOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth or Sixth Amendment of the Constitution required that all attorneys in the United States Attorney's office be disqualified from prosecuting petitioner because the United States Attorney, who previously represented petitioner in the case, was personally disqualified.

2. Whether petitioner's concurrent 20-year sentences on two racketeering convictions involving a pattern of bribery directed at the state criminal justice system constitutes cruel and usual punishment, in violation of the Eighth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 894 F.2d 231. The order of the district court denying petitioner's motion to disqualify all attorneys in the United States Attorney's Office (C.A. App. E1-E8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1990. The petition for a writ of certiorari was filed on April 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was con-

victed of conducting the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. 1962(c), and conspiring to commit that offense (RICO conspiracy), in violation of 18 U.S.C. 1962(d). He was sentenced to 20 years' imprisonment and fined $25,000. The court of appeals affirmed. Pet. App. A1-A18.

1. The evidence at trial showed that petitioner, an attorney, conspired with Nick Morfas, a deputy prosecutor in Lake County, Indiana, to fix state prosecutions for driving under the influence of alcohol (DUI). Eleven such incidents constituted the predicate acts underlying petitioner's RICO convictions. C.A. App. A1-A7. In most of those instances, a defendant charged with DUI retained petitioner to represent him after having been released on bond. Petitioner agreed to the representation in return for a fee that included the bond money posted by the defendant, and the defendant gave him the bond receipt. Petitioner then filed motions to dismiss his client's case and contacted Morfas, who stole and destroyed the prosecution's (and sometimes the court's) case file concerning the client. After the case was dismissed, petitioner received a check payable to the person who initially posted the bond, which he turned over to Morfas. Morfas forged the payee's signature and cashed the check to obtain his share of the proceeds of the scheme. Pet. App. A2-A3.[1] Morfas

[1] The scheme was made possible by an unusual procedure that developed in Indiana courts with respect to the filing of DUI charges. The Indiana Supreme Court held in *Watts* v. *State*, 249 Ind. 674, 234 N.E.2d 471 (1968), that a person could not be charged with DUI through the issuance of a traffic ticket. As a result, defense counsel filed motions to dismiss DUI cases that had been instituted in that manner. The court would grant such a motion, with the condition that the prosecutor refile the case by information or affidavit within 30 or 60 days. If the prosecutor did not refile within the specified time,

pleaded guilty and, pursuant to his plea agreement, testified against petitioner at trial. *Id.* at 2A; see Pet. 8.

2. In early 1984, petitioner learned that he was a suspect in Operation Bar-Tab, a federal investigation of the fixing of cases in Lake County. In April 1984, he hired attorney James Richmond to represent him in the investigation. Richmond continued that representation until August 1985, when he was appointed United States Attorney for the Northern District of Indiana. Seven days before Richmond took office, he wrote a letter to Assistant U.S. Attorney Andrew Baker, in which he stated that he would disqualify himself in petitioner's case, among others. C.A. Supp. App. 16. The Executive Office for United States Attorneys in the Department of Justice and all AUSAs handling criminal cases in the Northern District of Indiana were immediately informed of Richmond's recusal. *Id.* at 17-18. When he assumed office, Richmond appointed AUSA John Hoehner to be "Acting United States Attorney" in the investigation. C.A. App. E3-E4; Pet. App. A4.

Petitioner was indicted in October 1987. Prior to trial, he moved to disqualify the entire U.S. Attorney's Office from the case because Richmond had previously represented him. C.A. Supp. App. 1-6. In response, the government filed an affidavit of Richmond stating that he had not communicated with Hoehner or any other AUSAs regarding any aspect of the prosecution and had never attempted to exert influence over the case. C.A. App. E4. The AUSAs involved in the case filed affidavits to the same effect. C.A. Supp. App. 9-11; Pet. App. A4. The government also filed an affidavit of the Legal Counsel in

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defense counsel would file a second motion to dismiss, which the court would grant as a matter of course. Pet. App. A3 n.4. Morfas's destruction of the prosecutor's case file effectively prevented a DUI case from being refiled after the first dismissal.

the Executive Office for U.S. Attorneys, who described that Office's policies and procedures concerning disqualifications. C.A. App. 12-15. He explained that Section 1-3.515 of the United States Attorneys' Manual (1985) requires a U.S. Attorney to disqualify himself when he has a conflict of interest, but requires recusal of the entire U.S. Attorney's office only in "exceptional cases" and as a "last resort," so as to avoid undue disruption of ongoing investigations. The Legal Counsel stated that based upon his review of the matter, this was not an "exceptional case" requiring recusal of the entire U.S. Attorney's Office under Section 1-3.515, and that it therefore was "entirely appropriate" for the designated AUSA to handle the prosecution. C.A. Supp. App. 13, 14-15; Pet. App. A6-A7.

3. The district court denied petitioner's motion to disqualify the entire U.S. Attorney's Office. C.A. App. E1-E8. It held that petitioner's motion should be decided under Rule 1.11(c) of the Indiana Rules of Professional Conduct (I.R.P.C.), which are patterned after the American Bar Association's Model Rules of Professional Conduct (1983) and which were made applicable in this case by Rule 1(f) (now Rule 1(g)) of the Local Rules of the District Court for the Northern District of Indiana. C.A. App. E6. Under I.R.P.C. Rule 1.11(c), a government attorney is disqualified from participating in a matter in which he participated personally and substantially prior to beginning government service.[2] The comment to the rule states,

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[2] I.R.P.C. 1.11(c) provides in pertinent part:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment * * *.

however, that it "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." On that basis, the court held that "there is no need to disqualify the entire staff of a prosecutor who has been involved in a case while in private practice, provided that adequate screening procedures are used." C.A. App. E6. In the court's view, the affidavits filed by Richmond and his staff demonstrated that there had been adequate screening in this case. *Id.* at E8; see Pet. App. A4-A5.

The district court declined to follow several Indiana Supreme Court decisions cited by petitioner, *State* v. *Tippecanoe County Court*, 432 N.E.2d 1377 (1982), and *State ex rel. Goldsmith* v. *Superior Court*, 270 Ind. 487, 386 N.E.2d 942 (1979), which had interpreted the superseded Indiana Code of Professional Responsibility to require the disqualification of a prosecutor's entire staff when the prosecutor was personally disqualified. The district court found no indication in either case that screening procedures had been utilized, and it believed that the result in those cases would be different under the new I.R.P.C., especially where screening procedures are followed. C.A. App. E7. The court also noted that the Seventh Circuit had consistently held that screening procedures can rebut any inference of shared confidences or appearance of impropriety. *Ibid.*, citing *Schiessle* v. *Stephens*, 717 F.2d 417 (1983), and *LaSalle National Bank* v. *County of Lake*, 703 F.2d 252 (1983).

4. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A18. It first held that disqualification of the entire U.S. Attorney's Office was unnecessary because, in accordance with the I.R.P.C. and internal Justice Department standards, adequate screening measures were followed to ensure that Richmond did not share

client confidences with the AUSAs in charge of the prosecution. *Id.* at A6-A11.[3]

The court also held that petitioner's concurrent 20-year sentences were neither unconstitutionally excessive nor arbitrary. Pet. App. A12-A15. It noted that successful challenges to the proportionality of particular sentences should be "exceedingly rare," and pointed out that two other Operation Bar-Tab defendants had received comparable sentences. *Id.* at A13-A14. The court also acknowledged the government's position that Morfas's four-year sentence was justified by his cooperation with the government, *id.* at A13-A14, and concluded that, in any event, "it is possible that [petitioner's] sentence is not too long, but Morfas's is too short." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 10-16) that the participation of attorneys in the U.S. Attorney's Office for the Northern District of Indiana in his prosecution violated his Fifth and Sixth Amendments rights. In his view, when the chief prosecutor in an office is disqualified from a case, the Constitution requires all attorneys in the same office to be disqualified as well. This claim is without merit.

a. The Sixth Amendment guarantees a defendant the assistance of counsel for his defense. Petitioner does not suggest that the AUSAs who conducted the prosecution interfered with the performance of the counsel who represented him in that prosecution. Petitioner's Sixth Amend-

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[3] In addition, the court of appeals agreed with the district court that no evidentiary hearing was required on petitioner's disqualification motion, because petitioner did "not make a substantial showing that any actual disclosure took place or that he was prejudiced in any way." Pet. App. A12.

ment objection instead is directed at Richmond, who previously had represented him in the matter (albeit before the indictment was returned, and therefore before petitioner's Sixth Amendment right to counsel attached). It is undisputed, however, that Richmond immediately disqualified himself from any personal participation in the prosecution on behalf of the United States precisely because of that prior representation. As a result, there can be no claim here that Richmond breached a Sixth Amendment duty of loyalty to petitioner by switching sides to represent the prosecution.

Petitioner's Sixth Amendment claim therefore must rest on the premise that Richmond possessed confidential information about petitioner's defense. We may assume that he did, but that fact alone does not make out a Sixth Amendment violation. No Sixth Amendment violation results from the presence in the government of someone with knowledge of confidential defense information or strategy unless that information is actually conveyed to the attorneys responsible for prosecuting the defendant or is used to the defendant's detriment. See *Weatherford* v. *Bursey*, 429 U.S. 545 (1977); see generally C. Wright & K. Graham, *Federal Practice and Procedure* § 5489, at 434 (1986) (collecting cases); compare *United States* v. *Morrison*, 449 U.S. 361 (1981) (no relief in Sixth Amendment context absent proof of prejudice). In this case, the district court found that the U.S. Attorney's Office instituted adequate procedures to ensure that Richmond did not convey confidential information to the AUSAs charged with petitioner's prosecution, and both Richmond and the AUSAs executed uncontradicted affidavits stating that nothing of the sort occurred. Indeed, petitioner appears to have abandoned his contentions, rejected below, that the government's screening procedures were inadequate.[4]

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[4] Although petitioner limits his argument in this Court to the claim that Richmond's appointment as U.S. Attorney, standing alone, re-

b. Petitioner also contends that the failure by the district court to disqualify all attorneys in the U.S. Attorney's Office violated the Due Process Clause. He does not, however, identify what protections furnished by the Clause he believes were violated. There is no suggestion, for example, that any of the AUSAs who participated in the prosecution had a financial or other personal interest in the case. Compare *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249-252 (1980), with *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803-808 (1987). Instead, he claims that there was a denial of fundamental fairness simply by virtue of the participation in the prosecution by attorneys who are employed in the same Office in which Richmond serves. Our system of government presupposes, however, that the integrity of governmental processes will

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quired disqualification of the entire Office, he quotes (Pet. 15) the court of appeals' observation that "more could have been done" by way of screening. See Pet. App. A9. That statement, however, simply introduced the court's speculation that Richmond "conceivably" could have obtained access to the case file (at night or on weekends) or to material on the Office's computer, and that a system of locked case files and coded access to electronic data would have prevented even that possibility. *Ibid.* Surely, however, the Sixth Amendment does not require such measures, premised on the notion that the U.S. Attorney could not be trusted to respect the screening procedure. Moreover, as the court of appeals specifically stated, the absence of these stringent measures did not "render infirm the screening mechanisms employed in this case." *Ibid.*

Similarly, although several pleadings filed by the government bore Richmond's name, the court of appeals credited the government's explanation that this resulted from the mistaken use of preprinted forms, not from any personal involvement by Richmond, and it noted that Hoehner actually signed the documents. Pet. App. A9-A10. Finally, the court concluded that Richmond's participation in other aspects of Operation Bar-Tab did not prejudice petitioner or undermine the screening of Richmond from petitioner's case. *Id.* at A10-A11.

be assured by the personal disqualification of an official who has a personal interest or conflict of interest, and that the responsibility for the particular governmental action therefore may properly devolve upon the official who is next in the chain of command within the department, agency, or office. See pages 11-12, *infra*. Moreover, this Court has made clear in other contexts that a defendant cannot establish a violation of his right to a fair trial in the absence of some showing of an adverse effect on his trial. See *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); *United States* v. *Agurs*, 427 U.S. 97, 104, 112-113 (1976); *United States* v. *Marion*, 404 U.S. 307, 324 (1971); see also *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). The absence of any showing here that Richmond passed on confidential information to members of the prosecution team or influenced the course of the prosecution therefore defeats petitioner's Fifth Amendment claim as well.

c. Petitioner contends (Pet. 11-14) that review by this Court is necessary to resolve a conflict between the decision below and other decisions holding that when a defendant's lawyer becomes a prosecutor, all of the attorneys in the prosecutor's office are disqualified. None of the decisions petitioner cites, however, rests on an interpretation of the Fifth or Sixth Amendment. Instead, in each case the court found that participation of the attorneys in the office would create an appearance of impropriety or violate applicable rules of professional conduct. See *Arkansas* v. *Dean Food Products Co.*, 605 F.2d 380, 384 (8th Cir. 1979) ("[d]isqualification is an ethical, not a legal matter"); *Blair* v. *Armontrout*, 626 F. Supp. 512 (W.D. Mo. 1985) (relying on state bar rules); *United States* v. *Catalanotto*, 468 F. Supp. 503 (D. Ariz. 1978) (relying on state bar rules and decisions of state supreme court); *State* v. *Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982)

(relying on state ethical rules); *People* v. *Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980) (appearance of impropriety); *State* v. *Cooper*, 63 Ohio Misc. 2d 1, 409 N.E.2d 1070 (Ct. Common Pleas 1980) (appearance of impropriety). These decisions therefore do not support petitioner's claim that he had a constitutional right to have the entire U.S. Attorney's Office disqualified in this case.

Moreover, as the district court observed, C.A. App. E7, it is by no means clear that the Indiana Supreme Court, upon whose rulings petitioner principally relies (Pet. 12-13), would continue to require disqualification of a state prosecutor's entire staff in this setting even as a matter of professional ethics, in view of the explicit statement in the commentary to Rule 1.11(c) of the Rules of Professional Conduct adopted by the American Bar Association and the Indiana Supreme Court that such disqualification is *not* required. See pages 4-5, *supra*.[5] In any event, the instant case is not controlled by the resolution of such issues by the state courts or by principles of state law, as petitioner appears to contend. The States of course are free to adopt their own rules for the assignment of prosecutorial responsibilities, the disqualification of state prosecutors and their staffs, and the conduct of attorneys in state court. But under the Supremacy Clause, those state rules do not of their own force govern the conduct of a criminal prosecution by federal prosecutors in federal court.

Even where private counsel are concerned, "[f]ederal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law." *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); see 28 U.S.C. 1654. In carrying out that responsibility, the Dis-

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[5] In *Jaske* v. *State*, 539 N.E.2d 492, 496 (1989), an intermediate Indiana appellate court followed *Goldsmith* in ordering disqualification of the prosecutor's staff, but without mentioning the new Indiana Rules of Professional Conduct.

trict Court for the Northern District of Indiana has chosen to incorporate the Indiana Rules of Professional Conduct to govern the conduct of attorneys appearing before it. As we have explained, the district court has construed those Rules not to require disqualification of all attorneys in the U.S. Attorney's Office in a case such as this. Thus, petitioner's position finds no support in the general ethical standards of the legal profession that the district court has adopted as a matter of federal law.

Furthermore, this case does not involve the disqualification of private counsel for a private party. Petitioner's motion requested the district court to issue an order preventing officers and employees of a coordinate Branch (all attorneys in the U.S. Attorney's Office) from performing the responsibilities that were assigned to them within the Executive Branch. That is a matter to be addressed by the Acts of Congress and internal regulatory measures and directives that govern Executive Branch business and officials, not rules of conduct fashioned by the private bar or state and federal courts. Congress has vested in the Attorney General, not the courts, the responsibility to supervise the conduct of all litigation in which the United States is a party, 28 U.S.C. 516 and 518, to send "any officer of the Department of Justice * * * to any * * * district in the United States to attend to the interests of the United States in a suit pending in a court of the United States," 28 U.S.C. 517, and to "direct all United States attorneys [and] assistant United States attorneys * * * in the discharge of their respective duties," 28 U.S.C. 519. Within this statutory framework, Congress has made the prosecution of offenses in each judicial district the responsibility of the U.S. Attorney for that district (and therefore of his staff). 28 U.S.C. 547. Congress and the Attorney General also have adopted provisions requiring personal disqualifi-

cation in appropriate circumstances, but they have not mandated the disqualification of others within the same office on a theory of vicarious taint of the sort petitioner urges. See 18 U.S.C. 208(a); 28 U.S.C. 528; 28 C.F.R. 0.131 and Pt. 45.[6]

The regulations adopted by the Attorney General provide that attorneys employed by the Department of Justice "should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association [the predecessor to the current ABA Model Rules of Professional Conduct]," although they do not incorporate that Code wholesale as a matter of federal law to govern Justice Department attorneys. 28 C.F.R. 45.735-1(b). Signifi-

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[6] 18 U.S.C. 208(a) requires the personal disqualification of an officer or employee of the United States who has a financial interest in a particular matter, but it does not extend that disqualification to others within the government. Compare 18 U.S.C. 207(g) (barring a private partner of an Executive Branch official from acting as attorney for anyone *other than the United States* in any matter in which the official has participated personally and substantially while in the government).

28 U.S.C. 528(a) directs the Attorney General to promulgate rules to "require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof." The regulations implementing this requirement do not contain the automatic rule of imputed disqualification that petitioner urges. See 28 C.F.R. Pt. 45. Similarly, the relevant provisions of the *United States Attorneys' Manual*, which also implement 28 U.S.C. 528(a), provide for imputed disqualification of an entire U.S. Attorney's Office only in "exceptional cases," of which this is not one.

Consistent with the foregoing principles, 28 C.F.R. 0.131 authorizes each United States Attorney "to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney during his absence from office, or with respect to any matter from which he has recused himself."

cantly, the ABA Committee on Professional Ethics construed the Code of Professional Responsibility not to require disqualification of other attorneys in the same government agency when an attorney entering government had previously represented a private party in a matter, although it recommended that screening measures such as those followed here be adopted. ABA Formal Op. 342, 62 A.B.A.J. 517, 521 (1976). The Committee reasoned that "[n]ecessity dictates that government action not be hampered by such a construction" of the Code; that salaried government attorneys, unlike lawyers in private practice for whom rules of imputed disqualification were fashioned, do not have a financial interest in the success of legal representation by their office; and that the special responsibilities of government lawyers "lessen[ ] the temptation to circumvent the disciplinary rules through the action of associates." *Ibid.* The guidance furnished by the ABA Code, through the Justice Department's regulations, therefore furnishes an additional reason why petitioner's disqualification motion was unfounded even as a matter of professional ethics, not to mention as a matter of constitutional law.

Consistent with these principles, other courts of appeals, like the Seventh Circuit in this case, have declined to order the disqualification of an entire U.S. Attorney's Office when one attorney in that Office is disqualified, and have recognized the effectiveness of screening within the Office to prevent the sharing of confidential or privileged information. See *United States* v. *Caggiano*, 660 F.2d 184, 190-191 (6th Cir. 1981) (citing ABA Formal Op. 342), cert. denied, 454 U.S. 1149 and 455 U.S. 945 (1982); *In re Grand Jury Investigation*, 696 F.2d 449, 451-452 (6th Cir. 1982); *United States* v. *Grande*, 620 F.2d 1026, 1030-1031 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *Grand Jury Subpoena of Ford*, 756 F.2d 249, 254 (2d Cir. 1985); *United States* v. *Badalamenti*, 794 F.2d 821, 828 (2d

Cir. 1986). See also *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 363 n.34 (S.D.N.Y. 1955). Review by this Court therefore is not warranted.

2. Petitioner also contends (Pet. 17-25) that his sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment. This claim is insubstantial.

As the court of appeals noted (Pet. App. A13), this Court has made clear that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem* v. *Helm*, 463 U.S. 277, 289-290 (1983) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980)); see also *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982). This is not one of those "exceedingly rare" cases in which the sentence prescribed by the legislature is disproportionate to the crime under Eighth Amendment standards.

Petitioner bases his objection on the premise that he received the maximum sentence of 20 years on each of two counts for what he portrays as insignificant criminal conduct. But although the district court did impose the maximum sentence on each count, it provided for those sentences to run concurrently. 18 U.S.C. 1963(a). As a result, petitioner's sentence was only half the maximum that the court could have imposed. Furthermore, in *Solem* v. *Helm*, the defendant was sentenced to life imprisonment without possibility of parole, a fact the Court stressed in finding an Eighth Amendment violation and distinguishing *Rummel* v. *Estelle*, in which the defendant was eligible for parole. See 463 U.S. at 280-281, 302-303. Here, by contrast, petitioner was not sentenced to life imprisonment, and because he was sentenced under pre-1987 sentencing law, he will be eligible for parole after serving one-third of his sentence, 18 U.S.C. 4205(a) (1982) (repealed), as well as for good-time credits, 18 U.S.C. 4161 (1982) (repealed). Moreover, contrary to petitioner's assertion (Pet. 18-19), his crimes were not minor ones. While serving

as an attorney and officer of the court, he participated in a scheme to subvert the criminal justice process on at least eleven separate occasions by means of bribery. Petitioner's conduct therefore was far more serious than uttering a "no account" check for $100, the offense at issue in *Solem* v. *Helm*. Petitioner's sentence was therefore not out of line with his offense.

Petitioner contends (Pet. 19) that his sentence is out of line with the maximum sentence he could have received if he had been prosecuted for bribery under Indiana law (the predicate offense for his RICO convictions), because, under Indiana law, the maximum sentence for bribery is eight years. See *Solem* v. *Helm*, 463 U.S. at 291-292, 298-300 (comparing sentences authorized by law in same and other jurisdictions). This argument is without merit for several reasons. First, Congress reasonably concluded that the conduct addressed by the RICO provisions at issue here, which require proof of a pattern of racketeering activity, was particularly serious and deserving of special criminal sanctions under federal law. Second, petitioner's RICO convictions are based on eleven separate predicate acts of bribery; if petitioner had been prosecuted for each under Indiana law, he could have received a total of 88 years in prison, far in excess of what he received here. Third, the eight-year sentence authorized by Indiana law for a single offense of bribery roughly corresponds to the point in petitioner's federal sentence when he will be eligible for parole.

Petitioner also argues (Pet. 20-23) that his sentence should be set aside because it differs from the sentences actually received by Morfas and by defendants in other cases. But as the court of appeals pointed out (Pet. App. 14), petitioner's sentence is comparable to that imposed on two other defendants convicted in Operation Bar-Tab.

Morfas's shorter sentence is justified by his cooperation with the government in this case. See *id.* at 13. Moreover, if there is an unwarranted disparity between the two sentences, "it is possible," as the court of appeals observed, "that [petitioner's] sentence is not too long, but Morfas's is too short." *Id.* at A14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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